TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1086.

JOHN O. TUPPER AND ADOLPHUS LENFESTY,
PLAINTIFFS IN ERROR,

vs.

TULLY R. WISE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED OCTOBER 10, 1883.

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1 *Summons.*

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit District of California.

TULLY R. WISE, Plaintiff,
vs.
JOHN O. TUPPER *et al.*, Defendants.

Action brought in the said circuit court, and the complaint filed in the office of the clerk of said circuit court, in the city and county of San Francisco.

The President of the United State of America, Greeting: To John O. Tupper, Jonathan Bucher, Adolphus Lenfesty, John A. Baker, Washington Tucker, Jasper S. Hall, John Doe, and Richard Roe, Defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the circuit court of the
2 United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said court, in the city and county of San Francisco, within ten days after the service on you of this summons—if served in this county or if served out of this county, then within thirty days—or judgment by default will be taken against you.

The said action is brought to obtain a judgment against you to recover the possession of that certain piece or parcel of land situated in the county of San Joaquin, State of California, being all of section number twenty-one, in township number three north, of range number eight east, Mount Diablo base and meridian, according to the United States surveys, containing six hundred and forty acres, and also for two thousand dollars and the costs of this action,
3 and if you fail to appear and plead, answer, or demur, as herein required default will be entered against you and each of you, and the plaintiff will apply to the court for the relief demanded in the complaint herein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 14th day of March, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the 106th.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O. BEIRNE,
Deputy Clerk.

[Endorsed.]

OFFICE U. S. MARSHAL, DIST. OF CALIFORNIA.

I hereby certify that I received the within writ on the 15th day

of March, 1882, and that I have personally served the same at the county of San Joaquin, in this district, on John O. Tupper,
4 Jonathan Bucher, Adolphus Lenfesty, and Jasper S. Hall, on the 16th day of March, 1882, and on Washington Tucker on the 18th day of March, 1882, by delivering to and leaving with each of the above-named defendants personally, an attested copy of this writ, together with a copy of the bill of complaint in this action, duly certified by the attorney for plaintiff, attached thereto.

A. W. POOLE, *U. S. Marshal.*
By B. J. ACKERMAN, *Deputy.*

I further certify that, on the 4th day of April, 1882, at the county of San Joaquin, in this district, I personally served the within writ on John A. Baker, one of the defendants named herein, by delivering to ann leaving with said defendant personally an attested copy of this writ, together with a copy of the bill of complaint in this
5 action, duly certified by the attorney for plaintiff.

A. W. POOLE, *U. S. Marshal.*
By B. J. ACKERMAN, *Deputy.*

SAN FRANCISCO, CAL., *April* 5, 1882.

Filed Jan'y 16, 1883. L. S. B. Sawyer, clerk.

6 *Complaint.*

In the Circuit Court of the United States, Ninth Circuit, in and for the District of California.

TULLY R. WISE, Plaintiff,
vs.
JOHN O. TUPPER, JOHNATHAN BUCHER, ADOLPHUS LENFESTY, JOHN A. BAKER, WASHINGTON TUCKER, JASPER S. HALL, JOHN DOE, and RICHARD ROE, Defendants.

The plaintiff complains of the defendants, and alleges that he is ignorant of the true names of the last two defendants, and therefore sues them by fictitious names, and he asks leave, when they are discovered, to insert the same.

7 The plaintiff alleges that on the 1st day of October, A. D. 1881, he was the owner in fee simple and entitled to the possession of all of section No. twenty-one (21), in township No. three (3) north, of range No. eight (8) east, Mount Diablo base and meridian, according to the United States surveys, in the county of San Joaquain, in the State of California, containing 640 acres, and from that time to this has continued to be, and now is, so the owner and entitled to the possession; that afterwards, to wit, on the first day of October, A. D. 1881, while the plaintiff was so the owner and entitled to the possession of said premises, the defendants entered and ousted and ejected the plaintiff therefrom, and still withholds the possession thereof from the plaintiff, to his damage one thousand dollars.

And the plaintiff further alleges that the value of the rents,
8 issues, and profits is one thousand dollars per annum.

And plaintiff alleges that the value of said land exceeds five hundred dollars, and is worth two thousand dollars, and that his title to said land arises under the Constitution and laws of the United States; that plaintiff derives his title from a patent of the United States, and defendants deny the validity of such patent.

Wherefore plaintiff prays for judgment for possession of said land and for two thousand dollars and for costs of suit.

TULLY R. WISE,
In propria Persona.

Endorsed: Filed 14 March, 1882. L. S. B. Sawyer, clerk.

U. S. OF AMERICA, }
District of California, } *ss:*

In the foregoing entitled cause the demurrer of the defendants having been overruled by stipulation of counsel for the respective parties thereto, and one of the defendants, Jonathan Bucher,
9 having failed to answer the complaint therein, and the court having, on motion of counsel for plaintiff, ordered that the default of said defendant Bucher be entered therein: now, therefore, the default of said defendant Bucher for failure to answer the complaint in said cause is hereby entered.

Witness my hand this 16th day of Jan'y, 1883.

L. S. B. SAWYER, *Clerk.*

Demurrer.

10 In the Circuit Court of the United States, Ninth Circuit, in and for the District of California.

TULLY R. WISE, Plaintiff,
vs.
JOHN O. TUPPER, JONATHAN BUCHER, ADOLPHUS LENFESTY, JOHN A. BAKER, WASHINGTON TUCKER, JOSEPH S. HALL, JOHN DOE, and RICHARD ROE, Defendants.

Come now defendants, herein served with summons and complaint, and demurs to the complaint in said action, upon the following grounds:

1st.

That said complaint does not state facts sufficient to constitute a cause of action.

2d.

11 That the honorable court has not jurisdiction to hear and determine this action or jurisdiction of the subject-matter hereof, nor of the persons of the defendants herein, because—

1st. That it does not appear, from his said complaint, that the

plaintiffs are not residents and citizens of the State of California. It does appear, from said complaint, that the land sued for in said complaint is within the State of California, and that the alleged cause of action herein set forth is within the exclusive jurisdiction of the courts of said State.

3d.

That it does not appear, from the said complaint, that the alleged title of the plaintiff to said land arises under the Constitution and laws of the United States.

F. L. BALDWIN and
J. C. CAMPBELL,
Att'ys for Def't.

J. H. BUDD, *of Counsel.*

12 I hereby certify that the foregoing demurrer is not interposed for the purpose of delay.

F. T. BALDWIN,
Of Att'y for Def'ts.

Endorsed: Due service by copy of within demurrer admitted this 17th day of April, 1882. Tully R. Wise, att'y for pl'ff. Filed April 17, '82. L. S. B. Sawyer, clerk.

13 *Answer.*

In the Circuit Court of the United States, Ninth Circuit, in and for the District of California.

TULLY R. WISE, Plaintiff,
vs.
JOHN O. TUPPER, JONATHAN BUCHER, ADOLPHUS LENFESTY, and others.

Now comes the defendants, John O. Tupper and Adolphus Lenfesty, and for answer to the complaint herein, they deny, and each of them denies, that on the 1st day of October, A. D. 1881, or at any time prior or subsequent thereto, the plaintiff was the owner in fee simple, or otherwise, or entitled to possession of all or any part of the land described in the complaint; and said defendants deny, and each of them denies, that the plaintiff ever was at any
14 time, or is now, the owner or entitled to the possession of the whole or of any part of the land described in the complaint.

And said defendants deny, and each of them denies, that afterwards, to wit: on the 1st day of October, A. D. 1881, or at any other time while plaintiff was so the owner or entitled to the possession, these defendants entered, or ousted, or ejected the plaintiff from said land, or from any part thereof, or that they, defendants, still withhold the possession thereof from plaintiff, to his damage one thousand (1,000) dollars, or any sum of money whatever. Said defendants deny that the value of the rents,

issues, and profits of said land is one thousand (1,000) dollars per annum, or any greater sum than thirty cents per acre under peaceable possession and full enjoyment of the use thereof. Said
15 defendants deny, and each of them denies, that plaintiff's title to said land arises under the Constitution and laws of the United States, or that he derives his title from a patent of the United States; and said defendants deny, and each of them denies, that plaintiff has now, or ever has had, any title to, or right to, the possession of the land described in the complaint, or any part thereof.

And defendant John O. Tupper denies that he is now, or that he has ever been, in possession of any part of the land described in the complaint, excepting the northeast quarter (N. E. ¼) of said section twenty-one (21), township three (3) north, range eight (8) east, Mount Diablo base and meridian, containing one hundred and sixty (160) acres only, and which is now and has contiually been since the 14th day of February, A. D. 1865, public land of the United States, subject only to the pre-emption claim and settlement of this de-
16 fendant thereon, as hereinafter more fully alleged. That this defendant has not been permitted by plaintiff to cultivate or profitably use said quarter section of land, or any part thereof, since said 1st day of October, A. D. 1881, or during any time since this defendant settled thereon; and by reason of such said acts and hindrances of plaintiff said quarter section of land has been of no use or profit to this defendant since said 1st day of October, 1881, or since the time of his settlement thereon as hereinafter stated. That said quarter section is agricultural land, and has never been inclosed or fenced.

For a second defense and further answer to the complaint herein, defendant John O. Tupper alleges: That he is now, and has been for over six years last past, a citizen of the United States, and a married man and the head of a family, and qualified to pre-
17 empt a quarter section of public land; and that on the —— day of March, A. D. 1878, he made settlement in person and with his family on said northeast quarter (N. E. ¼) of section twenty-one (21), township three (3) north, range eight (8) east, Mount Diablo base and meridian, which contains 160 acres only, and is a part of the land described in the complaint herein, for the purpose and with the intention of pre-empting the same under the laws of the United States. And he then built a dwelling-house on said quarter section of land, in which he has resided and made his home with his family ever since said settlement, and has made the same his home; and immediately after said settlement he commenced improving and cultivating said quarter section of land, and has ever since continued to improve and cultivate the same,
18 except while prevented from doing so by plaintiff, his servants and agents. That the value of said improvements put and made on said quarter section of land by this defendant, and now thereon, is over the sum of five hundred (500) dollars, and consists

of a dwelling-house, a barn, a well, the planting out of some trees, and other minor improvements. That at the time of said settlement said quarter section of land was, and has ever since been, and is now, surveyed public land of the United States, and it has ever since been, and is now, subject to this defendant's said claim of pre-emption, and it has not since been, and is not now, reserved from pre-emption, and it has never been, and is not now, within the limits of, or selected as, the site of any city or town, and does not contain any known salines or minerals. That this defendant was not at the time of his said settlement, and has not since been,
19 the owner of 320 acres of land, or of any land whatever, and he did not quit or abandon any residence on his own land to reside on said quarter section of land, and he has never had or claimed any pre-emption right to any of the public lands of the United States, except to said quarter section of land so settled on by him, and he did not settle or improve said quarter section of land for the purpose of sale, or for the benefit of any person other than himself, and he has not made any agreement or contract of any kind, directly or indirectly, with any person whatever by which the title which he may acquire to said quarter section of land from the United States shall inure, in whole or in part, to the benefit of any person other than himself. That said quarter section of land has never been proclaimed for sale, and has never been subject to
20 private entry, and the same was at the time of said settlement, and has ever since been, within the district of lands subject to sale at the United States Land Office, at Stockton, California, and the plat of the United States survey of the township, embracing said quarter section of land was, at the time of said settlement, and has ever since been, and is now, on file in the U. S. Land Office at Stockton, California.

That the only claim of title or right to possession of plaintiff to said quarter section of land is under a claim of a pretended grant of said land by the Congress of the United States to the Western Pacific Railroad Company, under act of Congress, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other pur-
21 poses," approved July 1st, 1862, and act of July 2d, 1864, amendatory thereof and supplemental thereto, and under a pretended patent claimed to have been issued by the officers of the United States under the provisions of said acts of Congress.

This defendant alleges that said quarter section of land, or any of the land described in the complaint, was not granted under the said acts of Congress to said railroad company; but on the contrary the same was reserved from the grant of lands made to said railroad company, under said acts of Congress and by the provisions thereof; that at the time of the grant of lands to said railroad company, by said acts of Congress and under the provisions thereof, and at the time the line of the road of said Western Pacific

Railroad Company was definitely fixed under the provisions and meaning of said acts of Congress, the said quarter section of
22 land, and all of the land described in the complaint, was included within the boundaries of a large tract of land known by the name "Moquelamos," which had been claimed and held by one Andreas Pico from the 6th day of June, A. D. 1846, until the 14th day of February, A. D. 1865, as a Mexican grant, and to have been granted to him by and under the Mexican government on or about said 6th day of June, A. D. 1846, and which claim of said Pico to said tract of land, "Moquelamos," as such Mexican grant, was pending and undetermined in the Supreme Court of the United States until long after said grant of lands to said railroad company was made, and after the line of the road of said Western Pacific Railroad Company was definitely fixed. That the line of the road of said railroad company was definitely fixed under the pro-
23 visions of said acts of Congress, on, to wit, the 30th day of January, A. D. 1865, and the withdrawal of lands from private entry and sale for the benefit of said railroad company, under the provisions of said acts of Congress took place on the 31st day of January, A. D. 1865, and the said claim of said Andreas Pico for said tract of land, "Moquelamos," as a Mexican grant presented under the provisions of the act of said Congress, entitled "An act to ascertain and settle the private land claims in the State of California," approved March 3, 1851, was not determined by the United States Supreme Court until the 13th day of February, A. D. 1865, and all the land described in the complaint was reserved for the claim and satisfaction of said Mexican grant until said last named date.

24 That the pretended patent, under which alone plaintiff's claim, title, and right to the possession of the land described in the complaint, was issued by the officers of the United States Land Department without authority of law, and under a mistake of law, and the same is now, and has always been, null and void, and confers upon plaintiff no title or right to the possession of any part of the land described in the complaint herein.

That within thirty days after this defendant settled on said quarter section of land, he made and subscribed a declaratory statement of his intention to claim and pre-empt said quarter section of land under the laws of the United States, and requested the register of said United States land office at Stockton, California, to file the same in that office, and paid him his fees therefor,
25 but said register refused, through a mistake of law, and still refuses to file said declaratory statement, on the sole ground that said pretented patent for said land has been issued; and defendant has made similar application at divers times since, which have been similarly refused on the same ground.

That this defendant was, at the time of said settlement, and has ever since been, and is now, a qualified pre-emptor, under the pre-emption laws of the United States, and he has always been, and is

now, ready and willing to pay the United States therefor, and obtain a title for said quarter section of land, if permitted so to do, and to do all other acts necessary or proper to be done to attain that end, under the laws of the United States.

Wherefore said defendants hereby answering pray that
26 plaintiff do have no relief, and do take nothing by this action, and that they, said defendants, do have judgment for their costs.

MICH. MULLANY,
Attorney for Defendants John O. Tupper and Jonathan Bucher.

It is hereby stipulated that all the denials, allegations, and matters which are set forth and pleaded in the foregoing answer by defendant John O. Tupper separately shall be held and considered for all purposes and proceeding in said action as being set forth and pleaded by said defendant Adolphus Lenfesty, with the same force and effect as if the same were repeated by said Adolphus Lenfesty, with the single change that such separate answer on the part of Adolphus Lenfesty is and shall be held and considered as
27 made for the southeast quarter (S. E. ¼) of section twenty-one (21), township three (3) north, range eight (8) east, Mount Diablo base and meridian.

TULLY R. WISE,
Attorney for Plaintiff.
MICH. MULLANY,
Attorney for Defendants John O. Tupper and Adolphus Lenfesty.

I hereby certify and state that I have prepared and know the contents of the foregoing answer, and in my opinion it is well founded in point of law.

MICH. MULLANY,
Counsel for Defendants.

Endorsed: Service of a copy hereof admitted in due time this 28 day of October, A. D. 1882, within due time. Tully R. Wise, attorney for plaintiff. Filed Oct. 28, 1882. L. S. B. Sawyer, clerk.

28 *Answer.*

In the Circuit Court of the United States, Ninth Circuit, District of Califonia.

TULLY R. WISE, Plaintiff,
vs.
JOHN O. TUPPER *et al.*, Defendant.

Now comes the defendants, John O. Tupper and John A. Baker,

and, answering the complaint, deny each and every allegation of the same.

F. L. BALDWIN,
J. C. CAMPBELL, &
J. H. BUDD,
Att'ys for said Defendants.

It is agreed that defendants may give in evidence anything they could, if pleaded, to avoid the patent.

TULLY R. WISE,
In Person.

29 Endorsed: Received copy within this 24th November, A. D. 1882. Tully R. Wise, att'y for pl'ff. Filed Nov'r 24th, 1882. L. S. B. Sawyer, clerk. By J. F. O'Beirne, deputy clerk.

30 *Verdict.*

TULLY R. WISE
vs.
JOHN O. TUPPER. } No. 2737.

We, the jury, find in favor of the plaintiff against the defendant, John O. Tupper and Adolphus Lenfesty, and that said defendants were each severally in the wrongful possession of the lands respectively described in their several answers and in others, and that the value of the rents and profits of the lands so held and possessed by defendant Tupper is one hundred dollars; of the land so held and possessed by defendant Lenfesty, one hundred dollars; and that the value of each one of said tracts of 160 acres is three thousand dollars, and of the two of them six thousand dollars.

I. M. LIVINGSTON, *Foreman.*

31 Endorsed: Filed January 4, 1883. L. S. B. Sawyer, clerk.

32 *Judgment.*

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, District of California.

TULLY R. WISE
vs.
JOHN O. TUPPER *et al.* } No. 2737.

This cause came on regularly for trial on the fourth day of January, 1883, being a day in the November, 1882, term of said court before the court, and a jury of eleven men duly impanneled, counsel for the respective parties having consented in open court that the cause be tried by a jury of eleven men, Tully R. Wise, Esq., appearing on behalf of plaintiff, and Michael Mullany, Esq., on behalf of the defendants, and the evidence on behalf of the respective parties

having been introduced and closed, the cause, after arguments
33 of counsel and the instructions of the court, having been submitted to the jury, and the jury having subsequently rendered the following verdict: "We, the jury, find in favor of the plaintiff against the defendants, John O. Tupper and Adolphus Lenfesty, and that said defendants were each severally in the wrongful possession of the lands respectively described in their several answers and no others, and that the value of the rents and profits of the lands so held and possessed by defendant Tupper is one hundred dollars of the land so held and possessed by defendant Lenfesty one hundred dollars, and that the value of each one of said tracts of 160 acres is three thousand dollars, and of the two of them six thousand dollars," and the court having ordered that judgment be entered herein in accordance with said verdict:
34 Now, therefore, by virtue of the law and by reason of the premises, it is considered by the court that Tully R. Wise, plaintiff, do have and receive of and from John O. Tupper, one of said defendants, the possession of the northeast quarter of section twenty-one, township three north, range eight east, Mount Diablo base and meridian, containing 160 acres of land, and situate in the county of San Joaquin, State of California, and the sum of one hundred dollars rents and profits; from Adolphus Lenfesty, another of said defendants, the possession of the southeast quarter of section twenty-one, township three north, range eight east, Mount Diablo base and meridian, situate in San Joaquin county, State of California, and the sum of one hundred dollars rents and profits.

And it is further considered by the court that said plain-
35 tiff recover from said defendants, John O. Tupper and Adolphus Lenfesty, his costs in this behalf expended, taxed at forty-nine $\frac{80}{100}$ dollars.

Judgment entered January 4th, 1883.

L. S. B. SAWYER, *Clerk.*

I hereby certify that the foregoing is a full, true, and correct copy of an original judgment entered in the above-entitled cause.

Attest my hand and the seal of said circuit court, this 4th day of January, A. D. 1883.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Filed Jan'y 4, 1883. L. S. B. Sawyer, clerk.

36 *Clerk's Certificate.*

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, District of California.

TULLY R. WISE *vs.* JOHN O. TUPPER *et al.*

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, within and for the district of

California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the therein entitled action.

Witness my hand and the seal of said circuit court, this 4th day of January, A. D. 1883.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

37 Endorsed: Judgment roll. Filed Jan'y 4th, 1883. L. S. B. Sawyer, clerk. By J. F. O'Beirne, deputy clerk.

38 *Verdict.*

TULLY R. WISE *vs.* JOHN O. TUPPER *et al.*

We, the jury, find in favor of the plaintiff and against the defendants, Jonathan Bucher and John A. Baker, and find the value of the rents and profits of the quarter section in the possession of defendant Bucher one hundred dollars, and the value of the rents and profits of the quarter section in the possession of defendant Baker one hundred dollars.

DAVID M. ADLINGTON, *Foreman.*

Endorsed: Filed January 16, 1883. L. S. B. Sawyer, clerk.

39 *Judgment.*

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, District of California.

TULLY R. WISE
vs.
JOHN O. TUPPER *et al.* } No. 2737.

This cause having, on the 16th day of January, 1883, being a day in the November, 1882, term of said court, come on regularly for trial as to defendant John A. Baker, and for the assessment of damages by a jury as to defendant Jonathan Bucher, whose default for failure to answer has been duly entered herein before the court, and a jury of twelve men duly impanneled, Tully R. Wise, Esq., appearing in person, and L. M. Hoefler, Esq., appearing on behalf of de-
40 fendants last aforesaid, and the evidence on the part of the respective parties hereto having been introduced and closed, and the cause, after arguments of counsel and the instructions of the court, having been submitted to the jury, and the jury having subsequently rendered the following verdict: "We, the jury, find in favor of the plaintiff and against the defendants, Jonathan Bucher and John A. Baker, and find the value of the rents and profits of the quarter section in the possession of defendant Bucher one hundred dollars, and the value of the rents and profits of the quarter section in possession of defendant Baker one hundred dollars," and the court having ordered that judgment be entered herein in

accordance with said verdict, and for costs. Now, therefore, by virtue of the law, and by reason of the premises, it is considered by the court that Tully R. Wise, plaintiff, do have and re-
41 cover of and from Jonathan Bucher and John A. Baker, said defendants, the possession of all of section No. twenty-one, in township No. three north, of range No. eight east, Mount Diablo base and meridian, according to the United States surveys, in the county of San Joaquin, in the State of California, containing six hundred and forty acres.

And it is further considered by the court that said plaintiff recover from each of defendants last aforesaid the sum of one hundred dollars damages, and from both defendants last aforesaid his costs in this behalf expended, taxed at sixty $\frac{00}{100}$ dollars.

Judgment entered Jan'y 16, 1883.

L. S. B. SAWYER, *Clerk.*

I hereby certify that the foregoing is a full, true, and correct copy of an original judgment entered in the above-entitled cause.
42 Attest my hand and the seal of said circuit court, this 16th day of January, A. D. 1883.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Endorsed: Filed January 16th, 1883. L. S. B. Sawyer, clerk.

43 *Clerk's Certificate.*

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, District of California.

TULLY R. WISE *vs.* JOHN O. TUPPER *et al.*

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States, of the ninth judicial circuit, within and for the district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the therein entitled action.

Witness my hand and the seal of said circuit court, this 16th day of January, A. D. 1883.

L. S. B. SAWYER, *Clerk.*
By J. F. O. BEIRNE, *Deputy Clerk.*

Endorsed: Judgment roll. Filed 16th January, 1883. L. S. B. Sawyer, clerk. By J. F. O'Beirne, deputy clerk.

44 *Stipulation.*

In the Circuit Court of the United States, Ninth Circuit, in and for the State of California.

TULLY R. WISE, Plaintiff,
vs.
JOHN O. TUPPER, JONATHAN BUCHER, ADOLPHUS LENFESTY, *et al.*, Defendants.

It is hereby stipulated that the subject-matter in dispute in said

action, as against defendants, John O. Tupper and Adolphus Lenfesty, and as answered for by them, exceeds in value the sum of five thousand one hundred (5,100) dollars, exclusive of costs.

Dated this 13th day of October, 1882.

TULLY R. WISE,
Attorney for Plaintiff.

Endorsed: Filed January 11th, 1883. L. S. B. Sawyer, clerk. By J. F. O'Beirne, deputy clerk.

45 *Bill of Exceptions.*

In the Circuit Court of the United States, in and for the Ninth Circuit, District of California.

TULLY R. WISE, Plaintiff,
vs.
JOHN O. TUPPER, ADOLPHUS LENFESTY, and others, Defendants.

Bill of exceptions by and on the part of defendants, John O. Tupper and Adolphus Lenfesty.

This cause came on for trial before said court, and a jury, on the 4th day of January, 1883, Tully R. Wise appeared as counsel for plaintiff, and Messrs. D. L. Smoot and Mich. Mullany appeared for said defendants; and the following proceedings were had, viz.:

46 The plaintiff offered in evidence a patent from the United States to the Western Pacific Railroad Company, which is in the following words and figures, viz.:

"United States of America to all to whom these presents shall come greeting: Whereas by the act of Congress, approved July 1st, 1862, as amended by the act of July 2d, 1864, March 3d, 1865, and joint resolution of May 21st, 1866, to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, authority is given to the Western Pacific Railroad Company of California, a corporation existing under the laws of the State, to construct a railroad and telegraph line under certain conditions and stipulations as expressed in said acts, and provision is made for granting to the said company every alternate section of public

47 land designated by odd numbers, to the amount of ten alternate sections per mile on each side of said railroad on the line thereof and within the limits of twenty miles on each side of said road not sold, reserved, or otherwise disposed of by the United States, and to which pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed; and whereas an official statement, bearing date February 1st, 1870, from the Secretary of the Interior, has been filed in the General Land Office, showing that the commissioners appointed by the President under provisions of the sixth section of the said act of Con-

gress, approved July 2, 1864, have reported to him that the line of railroad and telegraph of said company has been constructed and fully completed and equipped in the manner prescribed by the acts of Congress relative to the Pacific railroad and telegraph line; and the president of the Western Pacific Railroad Company, has applied for a conveyance of the title to the lands granted to the said company by the said acts of Congress of July 1st, 1862, July 2d, 1864, March 3d, 1865, and joint resolution of May 21st, 1866, and whereas certain tracts of land have been selected under the acts aforesaid by Charles McLoughlin, the agent for the Western Pacific Railroad Company, as shown by his original lists of selections, dated September 10th and 17th, and November 30th, 1869, certified under dates September 17 and 23d, 1869, and January 10th, 1870, by the registers and receivers at Stockton, Sacramento, and Marysville, California, which tracts are embraced in the Western Pacific railroad list of selection, within the twenty mile limits of the line of route, being situated north and south of the base line and east of the Mount Diablo meridian in the district of lands subject to sale at Stockton, Sacramento, and Marysville, California, as follows, to wit: East half of section twenty-one, in township three (3) north, range eight (8) east, Mount Diablo base and meridian. (Here follows a description of other lands not involved in this action.)

Now, know ye, that the United States of America, in consideration of the premises and pursuant to the said acts of Congress have given and granted, and by these presents do give and grant, unto the said Western Pacific Railroad Company, of California, and to its assigns, the tracts of lands selected as aforesaid and described in the foregoing, yet excluding and excepting from the transfer of these presents all mineral lands, should any such be found to exist in the tracts described in the foregoing, but this exception and exclusion, according to the terms of the statute, shall not be construed to include iron lands, to have and to hold the said tracts with the appurtenances unto the said Western Pacific Railroad Company, of California, and to its assigns forever, with the exclusion and exception as aforesaid.

In testimony whereof, I, U. S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this 9th day of April, A. D. 1870, and of the Independence of the United States the ninety-fourth.

By the President:

U. S. GRANT.

[SEAL.] S. BURRILL, *Secretary.*

S. N. GRANGER,

Recorder of the General Land Office."

The defendants, by their counsel, and each of them, objected to

the admission in evidence of this patent, on the grounds that
51 it had not been shown that the lands therein described and in dispute in this action were not reserved or disposed of by the United States at the time the line of the road of the Western Pacific Railroad Company was definitely fixed, and that it had not been shown that the lands therein described and in dispute in this action, were public lands at the time the line of said road was definitely fixed, or even at the time the acts of Congress therein mentioned were passed. The court overruled the objection, and the defendants, and each of them, excepted, which exception was allowed and noted by the court, and said patent was read in evidence. The plaintiff then read in evidence articles of consolidation and amalgamation of the Western Pacific Railroad Company and the Central Pacific Railroad Company of California into the new cor-
52 poration known as the Central Pacific Railroad Company, dated June 22d, 1870.

Plaintiff then offered in evidence a deed of conveyance from the Central Pacific Railroad Company to Charles McLaughlin, which is in the following words and figures, viz:

"Know all men by these presents, that the Central Pacific Railroad Company, successor to the Western Pacific Railroad Company and the Central Pacific Railroad Company of California, consolidated, in consideration of the sum of $1 to it paid by Charles McLaughlin of Santa Clara county, California, the receipt of which is hereby acknowledged, hereby gives, grants, bargains, sells and conveys to the said Charles McLaughlin, his heirs and assigns, the following tracts of land, situate in San Joaquin county, California,
53 (here follows a description of the same land described in the patent aforesaid,) together with all the privileges and appurtenances thereto appertaining and belonging, and also reserving all claims of the United States to the same mineral lands. To have and to hold the aforesaid premises to the said Charles McLaughlin, his heirs and assigns, to his and their use and behoof forever.

In testimony whereof, the said Central Pacific Railroad Company has caused these presents to be signed by its president and secretary, and sealed with the corporate seal this 8th day of August, A. D. 1873.

[Corporate seal of Central Pacific Railroad Company.]

LELAND STANFORD,
Pres't C. P. R. R. Co.
E. H. MILLER, JR.,
Sec'y C. P. R. R. Co."

STATE OF CALIFORNIA,
County of Sacramento, } *ss:*

On this 8th day of August, A. D. 1873, personally ap-
54 peared before me, a notary public in and for said county, Leland Stanford, president, and E. H. Miller, Jr., secretary of the within named Central Pacific Railroad Company, known to me

to be the persons described in and who executed the foregoing instrument as such officers of said company, who acknowledged to me that they executed the same freely and voluntarily as the free act and deed of said company, and for the uses and purposes therein mentioned.

Witness my hand and official seal, the day and year aforesaid.

[NOTARIAL SEAL.] CHARLES J. TORBERT,
Notary Public in and for said County of Sacramento.

The defendants, and each of them, by their counsel, objected to the admission in evidence of this deed, on the ground that it had not been shown that there was any authority in the persons
55 whose names are subscribed thereto as president and secretary, to make or execute the same in the name of or for the Central Pacific Railroad Company, or that the board of directors of said company ever authorized it to be made or executed. The defendants admitted that this deed bears the corporate seal of the Central Pacific Railroad Company, but objected to it on the further ground that it has not been shown that the persons who have signed said deed as president and secretary had any authority to use the said seal upon said deed.

The court overruled the objection, and the defendants, and each of them, excepted, which was noted and allowed by the court.

The plaintiff then gave in evidence a deed, dated October 9th, 1878, from Chas. McLaughlin to Henry M. Newhall, for the east half of section 21, township 3 north, range 8 east, Mount Dia-
56 blo base and meridian; and a deed from said Henry M. Newhall to plaintiff for the same premises, dated December 1st, 1879, which showed a claim of title from the railroad company's patent to plaintiff.

The plaintiff then proved that the value of the use and occupation of the lands was equal to that found by the jury in their verdict, and that the defendants were in the possession in severalty of the respective portions of the land described in the complaint, as set forth by them in their several respective answers, on the 2d day of January, 1882, and that they have ever since continued, and are now, in such possession.

Plaintiff then rested his case.

To maintain the issues in this case on the part of the defendants, and to establish that the form of patent under which plaintiff claims title to the lands in dispute is not a patent in law or
57 in fact; that the lands in dispute with other lands had been claimed and reserved as a part of Mexican grant, from the fifteenth day of June, 1846, continuously, until the thirteenth day of February, 1865, and on said last-named day the said lands in dispute in this action first became public lands of the United States, and for that reason were not embraced in the lands granted by the act of Congress to the Western Pacific Railroad Company; and that

the said patent issued therefor conveyed no title, and was issued without authority of law, and is null and void; defendants offered, and each of them offered, to prove that the lands in dispute are a portion of, and are included within, the exterior limits of a tract of land which had been claimed as a grant made by the Mexican
58 Government to one Andreas Pico on the 15th day of June A. D. 1846, known by the name "Moquelamos."

That on, to wit, the 22d day of September, A. D. 1852, said Andreas Pico presented and filed his petition to and with the Board of Land Commissioners appointed under the provisions of the act of Congress approved March 3d, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," to have said Mexican grant confirmed.

That on, to wit, April 24th, 1857, the United States district court for the northern district of California confirmed said Mexican grant to said Pico; and an appeal to the Supreme Court of the United States was taken by the United States from the decree of said district court confirming said grant, and that said Mexican grant continued thereafter under judicial inquiry and consideration
59 and undetermined before said district court and Supreme Court of the United States until said 13th day of February, A. D. 1865, when said grant was rejected by said Supreme Court. That said Mexican grant is the same which is treated and considered by said Supreme Court in the case of the United States *vs.* Pico, reported in Vol. 22 of Howard's Reports, page 406 *et seq.;* and in the case of Pico *vs.* United States, Vol. 2 of Wallace's Reports, page 279 *et seq.;* and in the case of Newhall *vs.* Sanger, in Vol. 92 United States Reports, page 761 *et seq.* That while the lands in controversy in this action were thus claimed for and as a part of said Mexican grant, to wit, on the 30th day of January, A. D. 1865, the line of the road of said Western Pacific Railroad Company was definitely fixed, under and within the intent and meaning of the provisions of the act of Congress of July 1st, 1862, entitled
60 "An act to aid the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean," and the acts amendatory thereof and supplemental thereto; and that on the 31st day of January, A. D. 1865, the lands within the limits designated by said acts of Congress as being granted to said railroad company were withdrawn from pre-emption, private entry, and sale by virtue of the provisions of said acts. That the lands described in the complaint in this action are within the limit of twenty miles on the east side of the line of the road of said railroad company, and that no part of the lands so described in the complaint has been taken or ever used for any depot, shops, switch, turn-out, or roadbed of said railroad or of said railroad company.

That the township survey and plat, embracing the lands
61 in dispute herein, were filed in the United States land office, at Stockton, State of California, on the 29th day of July, A.

D. 1858, and the same have ever since been, and now are, on file in said land office.

That all the lands in dispute herein are agricultural lands, and no part thereof has ever been enclosed or fenced, and no part thereof has ever been proclaimed for sale, or subject to private entry under the laws of the United States, since the final rejection of said grant, on February 13th, 1865, and that no part of said lands has ever been, or is now, within the limits of, or selected for, the site of any city or town, and there are no known salines or mines thereon.

The plaintiff objected to the offered proof, on the ground that it is incompetent, and not admissible to contradict or attack the United States patent, which is conclusive in this action.

62 The court sustained the objection, and the defendants, and each of them, excepted, which exception was noted and allowed by this court.

For the purpose of showing the right of the defendants, and each of them, to take and keep the possession of the respective portions of the lands in dispute herein, taken and kept by them respectively, they offered to prove:

That the defendant, John O. Tupper, is now, and has been for over six years past, a citizen of the United States, over the age of 21 years, and a single man, and qualified to pre-empt to quarter section of public land.

That on the —— day of March, 1877, he made a settlement person on the northeast quarter of section 21, township 3 north, range 8 east, Mount Diablo base and meridian, which contains 160

63 acres only, for the purpose and with the intention of pre-empting the same under the laws of the United States.

That he then built a dwelling-house on said quarter section of land, in which he has resided and made his home ever since said settlement, and in which he does now reside and make his home, and that immediately after said settlement he commenced improving and cultivating said quarter section of land, and has ever since continued to improve and cultivate the same, except while prevented from doing so by plaintiff, his agents and servants.

That the value of the improvements put and made on said quarter section of land by said John O. Tupper, and now thereon, is over the sum of $300, and consists of a dwelling house, barn, well, and minor improvements. That said Tupper was not at the time

64 of his said settlement, and has not since been, and is not now, the owner of 320 acres of land, or of any land whatever, and he did not quit or abandon any residence on his own land to reside on said quarter section of land; that he has never had or claimed any pre-emption right to any of the public lands of the United States, except to said quarter section of land so settled on or by him; and he did not settle on or improve said quarter section of land for the purpose of sale or for the benefit of any person other than himself, and he has not made any agreement or contract of any kind, directly or indirectly, with any person or party by which the

title which he may acquire to said quarter section of land from the United States shall inure in whole or in part to the benefit of any other person or party; that he has never been, and is not
65 now, in possession of, and has never claimed any other part of the land described in the complaint. That within 30 days after he settled on said quarter section of land, he described and made a declaratory statement of his intention to claim and pre empt said quarter section of land under the laws of the United States, and requested the register of said United States Land Office at Stockton, California, to file the same in that office, and paid the legal fees therefor, and said register refused to file, and still refuses to file, said statement, on the sole ground that said form of patent has been issued to the Western Pacific Railroad Company for said land; and he has made similar applications at divers times since, which have been refused on the same sole ground.

That he has always been, and is now, ready and willing to
66 pay the United States therefor, and obtain a title for said quarter section of land as such pre-emptor, and to do all acts and things necessary to obtain the end just stated.

The plaintiff objected to this offered proof, on the ground that it is immaterial, irrelevant, incompetent, and inadmissible, the patent being conclusive in this action.

The court sustained the objection, and the defendants, and each of them, excepted, and the exception was noted and allowed by the court.

In order to facilitate the trial and save time, it was agreed to by counsel for plaintiffs and defendants, and consented to by the court, that the same offer of proof be held and considered as being made for his co-defendant, Adolphus Lenfesty, and for and concerning the quarter section of the land in dispute herein held and
67 claimed by him as described in his answer as was made for defendant Tupper, and for said quarter section claimed and held by him, and that the same objections be held and considered made thereto by plaintiff, with the same ruling by the court and exceptions by the defendants, and each of them. Defendants now moved that this action be dismissed, on the ground that the court has no jurisdiction thereof; that plaintiff invokes and alleges the jurisdiction of this court, on the ground that he claims title under a patent of the United States, and that defendants deny the validity of such patent; and that the plaintiff has, on the trial, objected to defendants being permitted to deny or question the validity of said alleged patent, which objection the court has sustained, and thereby ousted
68 itself of the apparent jurisdiction, which plaintiff's allegation seems to confer upon it, and which arose on plaintiff's own objection.

The court denied the motion, and the defendants, and each of them, excepted, which exception was noted and allowed by the court.

The defendants then moved that the cause of action stated in the

complaint, for the rents and profits [of] lands in dispute herein, and also the cause of action stated in the complaint for damages alleged to have been caused to plaintiff by reason of the entry and detention by defendants upon and of said lands, be dismissed, on the ground that this court has no jurisdiction of either of said causes of action, and that neither of said causes of action arises under the Constitution or laws of the United States.

69 The court denied the motion, on the ground that said cause of action is only incidental to the principal cause of action, and the defendants, and each of them, excepted, which exception was noted and allowed.

It was stipulated and admitted in open court, as evidence before the jury by the parties plaintiff and defendants, that the value of each quarter section of land in dispute in this action, in the respective possession of each of the defendants, John O. Tupper and Adolphus Lenfesty, is three thousand dollars, and the value of said two of said quarter sections is six thousand dollars.

The court then charged the jury thus: "Gentlemen: There is really but one issue of facts upon which there is any conflict in the
70 evidence in this case, and that is the value of the rents and profits of these pieces of land. The plaintiff has put in evidence the patent of the United States, and claims title through that patent to himself; that shows the legal title in him; whether he has got it rightfully or not, is not open for consideration in this case. If he has got it wrongfully, the remedy is elsewhere.

There was a grant made to the Western Pacific Railroad Company of certain lands. There were certain officers appointed to ascertain whether these lands were in the grant or not. They have passed on that question and issued the patent. Their action is conclusive so far as this case is concerned. The legal title, whether rightfully or wrongfully, is in the plaintiff in this case. There was a larger amount sued for than the evidence shows that the
71 plaintiff has title to. Each of these two defendants' now under consideration, denies possession of the whole land, and sets up that he is in possession of 160 acres only, describing it. The evidence tends to establish that fact. The only question for you to determine is—because the other is a question of law decided by the court upon the title being shown—what amount the plaintiff shall recover? As the defendants have defended separately, there should not be a joint judgment for all the rents and profits.

Each should pay the rents and profits arising from his particular piece of land.

The defendants excepted to these portions of the instructions or charge which hold that the patent shows the legal title to be in the plaintiff, and whether he has got it wrongfully or not, is not open for consideration in this case; and that the action of the offi-
72 cers who issued that patent is conclusive in this case.

The court noted and allowed said exception.

Thereupon the jury returned the following verdict, viz: "We, the

jury, find in favor of the plaintiff, and against the defendants, Tupper and Lenfesty, and said defendants were each severally in the wrongful possession of the land respectively described in their several answers and no others; and that the value of the rents and profits of the land so held and possessed by defendant Tupper is $100, and of the value of the rents and profits of the land so held and possessed by defendant Lenfesty is $100, and the value of either one of said tracts of 160 acres is $3,000, and the value of both of said tracts is $6,000.

"J. M. LEVISTON, *Foreman.*"

73 Said verdict was returned and filed on the 4th day of January, A. D. 1883, and judgment was entered thereon, as appears by the record.

The foregoing was all the evidence adduced and offered, and all the proceedings which took place on the trial of said cause.

And the foregoing bill of exceptions is hereby certified, settled, and allowed as correct, this 31st day of January, A. D. 1883, and within due time.

(Signed) LORENZO SAWYER,
Circuit Judge.

Endorsed: Filed February 7, 1883. L. S. B. Sawyer, clerk.

74 *Specification of Errors.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

TULLY R. WISE, Plaintiff,
vs.
JOHN O. TUPPER, Defendant.

The defendants, John O. Tupper and Adolphus Lenfesty, specify, and each of them specifies, the following errors in law occurring at the trial of this cause, and excepted to by them, and each of them, viz:

1st. The court erred in overruling the objections made by defendants, and by each of them, to the admission in evidence of the form of patent purporting to have been issued by the United States
75 to the Western Pacific Railroad Company, on April 9th, 1870.

2d. The court erred in overruling the objections made by defendants, and by each of them, to the admission in evidence of the form of deed purporting to have been made by or in the name of the Central Pacific Railroad Company to Charles McLaughlin, on August 8th, 1873.

3d. The court erred in sustaining plaintiff's objection to the proof offered by defendants, that the lands in dispute and described in the complaint herein, were held, claimed, and reserved as a part of the Mexican grant "Moquelamos," from the year A. D. 1846

until the 13th of February, 1865, and that the line of the road of said Western Pacific Railroad Company was definitely fixed on January 30th, 1865, and that the lands to which the said company was
76 entitled were withdrawn from pre-emption, private entry, and sale on January 31st, 1865, and the character and location of the lands in dispute, as was offered to be proved at length and in detail by defendants above named.

4th. The court erred in sustaining plaintiff's objection to the evidence and proof offered by defendants as to the qualifications and rights and good faith of defendant Tupper, and his object in settling upon that part of the lands in dispute herein, and of his acts in pursuant of such settlement and intentions to pre-empt said portion of said land.

5th. The court erred in sustaining plaintiff's objection to the evidence and proof offered by defendants as to the qualifications, rights, and good faith of the other defendant, Lenfesty, as to
77 his object in settling upon the part of the lands in dispute herein claimed by him, and of his acts in pursuance of such settlement and intentions to pre-empt the portion of the lands in dispute settled on by him.

6th. The court erred in denying the motion made by defendants to dismiss this action on the grounds stated; that the court became ousted and was without jurisdiction of the cause; and that no jurisdiction was shown or appeared.

7th. The court erred in charging the jury that the legal title for the lands in dispute became vested in plaintiff under said form of patent, whether it was obtained rightfully or not, and that the action of the officers of the Land Department in issuing said patent was conclusive in this action.

And defendants, and each of them, present the foregoing
78 errors and assign the same, and pray that the judgment herein be reversed, &c.

MICH. MULLANY,
Attorney for Defendants.

Endorsed: Service of a copy hereof admitted this 8th day of February, A. D. 1883. Tully R. Wise, attorney for plaintiff and plaintiff in *pro per*. Filed February 8, 1883. L. S. B. Sawyer, clerk. By J. F. O'Beirne, deputy clerk.

79 *Bond on Writ of Error.*

In the Supreme Court of the United States.

JOHN TUPPER and ADOLPHUS LENFESTY, Plaintiffs in Error,
vs.
TULLY R. WISE, Defendant in Error.

Know all men by these presents, that we, George W. Gordon and Cy McDonald, are held and firmly bound unto Tully R. Wise, said defendant in error, in the sum of two thousand dollars, lawful

money of the United States of America, to be paid to the said Tully R. Wise, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and ad-
80 ministrators, firmly by these presents.

Sealed with our seals; dated this twenty-seventh day of January, A. D. 1883.

Whereas the above-named, John O. Tupper and Adolphus Lenfesty, have prosecuted a writ of eorror to the Supreme Court of the United States to reverse the judgment rendered in the action entitled Tully R. Wise against John O. Tupper *et al.* (No. 2737) by the circuit court of the United States, in and for the District of California—

Now, therefore, the condition of the obligation is such that if said John O. Tupper and Adolphus Lenfesty shall prosecute their said writ of error to effect, and answer all costs and damages, if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain full force and virtue.

G. W. GORDON.
CY McDONALD.

Signed, sealed, and delivered in presence of—

81 I, L. S. B. Sawyer, clerk of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing eighty written pages, numbered from 1 to 80 inclusive, are a full, true, and correct copy of the record and of all proceedings in the therein entitled cause, and that the same together constitute the return to the annexed writ of error.

Witness my hand and seal of said circuit court, this 25th day of May, A. D. 1883.

[SEAL.] L. S. B. SAWYER, *Clerk.*

82 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States, of the Ninth Judicial Circuit, District of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between John O. Tupper and Adolphus Lenfesty, plaintiffs in error, and Tully R. Wise, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid,

with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 14th day of February, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and seventh.

[SEAL.] L. S. B. SAWYER, *Clerk.*

The above writ of error is hereby allowed.

LORENZO SAWYER,
Circuit Judge.

83 Due service of a copy of the within writ admitted, this 16th day of February, A. D. 1883.

TULLY R. WISE,
Attorney for Defendants in Error.

The Answer of the Judges of the Circuit Court of the United States for the District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded by the Court.

L. S. B. SAWYER, *Clerk.*

Endorsed: No. 2737. United States Supreme Court. John O. Tupper and Adolphus Lenfesty, pl'ffs in error, *vs.* Tully R. Wise, def't in error. Writ of error. Due service of a copy of the within writ admitted, this 16th day of February, A. D. 1883 ———, attorney for def's in error. Filed 16 February, 1883. L. S. B. Sawyer, clerk.

84 UNITED STATES OF AMERICA, *ss.*

To Tully R. Wise, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1883, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of California, wherein John O. Tupper and Adolphus Lenfesty are

plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States, district of California, this 14th day of February, A. D. 1883, and of the Independence of the United States, the 107th.

[SEAL.] LORENZO SAWYER,
Circuit Judge.

Due service of a copy of the within citation admitted this 16th day of February, A. D. 1883.

TULLY R. WISE,
Attorney for Defendants in Error.

Endorsed: No. 2737. United States Supreme Court. John O. Tupper and Adolphus Lenfesty, pl'ffs in error, *vs.* Tully R. Wise, def't in error. Citation. Due service of a copy of the within citation admitted this 16th day of February, A. D. 1883. ——, attorney for def't in error. Filed 16th February, 1883. L. S. B. Sawyer, clerk.

Endorsed on cover: California C. C. U. S. No. 1086. John O. Tupper and Adolphus Lenfesty, plaintiffs in error, *vs.* Tully R. Wise. Filed 10th October, 1883.

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 1086.

JOHN C. TUPPER AND ADOLPHUS LENFESTY,
PLAINTIFFS IN ERROR,

vs.

TULLY R. WISE, DEFENDANT IN ERROR.

Motion to Dismiss, with which is united a Motion to Affirm.

HENRY BEARD,
CHAS. H. ARMES,
Att'ys for Def't's in Error.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 1086.

JOHN O. TUPPER AND ADOLPHUS LENFESTY,
PLAINTIFFS IN ERROR,

vs.

TULLY R. WISE, DEFENDANT IN ERROR.

Motion to Dismiss, with which is united a Motion to Affirm.

Now comes the defendant in error by his attorney and moves the court to dismiss the above entitled cause for the following reasons:

1st. It appears from the record that the value of the matter in dispute between the defendant in error and either one of the plaintiffs in error does not, exclusive of costs, exceed the sum of five thousand dollars.

2d. The bond filed by the plaintiffs in error has not been taken as required by Section 1000 of the Revised Statutes. There is no evidence in the record that said bond was ever presented to or in any manner approved by the judge who signed the citation to the defendant in error.

Bangs *vs.* R. R. Co., 23d Howard, p. 1.

Motion to Affirm.

And the defendant in error by his attorneys also moves the court to affirm the judgment of the U. S. circuit court for the following reason, viz:

Because, if the court shall be of the opinion that it has jurisdiction, the questions arising upon the record in this cause have been well settled by this court, and therefore it will appear that the writ of error has been sued out for delay.

Henry Beard
C. H. Armes
Attys. for def't in Error

Jan 5th 1884

Statement of the Case.

The defendant in error commenced a suit in the nature of ejectment against the plaintiffs in error, (Tupper and Lenfesty,) and Jonathan Bucher, John A. Baker, Washington Tucker, Jasper S. Hall, John Doe, and Richard Roe, alleging that on the 1st Oct., 1881, he was the owner in fee and entitled to the possession of all of section 21, in township 3 N., range 8 E., of Mt. Diablo base and meridian, California, containing 640 acres, and afterwards the defendants entered on said land and ejected him. That the value of rents and profits is $1,000, and of the land $2,000, &c. That the plaintiff claimed title under a patent from the United States and the defendants deny the validity of said patent. (Record, pp. 2, 3.)

The answer of the two plaintiffs in error, Tupper and Lenfesty, was filed Oct. 25, 1882, denying generally the allegations of the complaint; and defendant John O. Tupper "denies that he is now or that he ever has been in possession of any part of the land described in the complaint, excepting the N. E. ¼ of said section 21, township 3 N., range 8 E., containing 160 acres only," (Rec., 5.) He further alleged that said quarter-section of land is public land of the United States, and that he made legal settlement thereon under the pre-emption laws in March, 1878, and that the pretended patent under which the plaintiff (Wise) claimed was null and void and confers no title on the said Wise. (Record, p. 5 to 8.)

Having answered specially at length, it was stipulated by Wise for himself and by Michael Mullany, attorney for defendants Tupper and Lenfesty, that "all the denials, allegations, and matters which are set forth and pleaded in the foregoing answer by defendant John O. Tupper separately, shall be held and considered for all purposes and proceedings in said action as being set forth and pleaded by said Adolphus Lenfesty with the same force and effect as if the same were repeated by said Adolphus Lenfesty, with the single change that said separate answer on the part of said

Adolphus Lenfesty is and shall be held and considered as made for the southeast quarter (S. E. ¼) of section twenty-one (21), township three (3) north, range eight (8) east, Mt. Diablo base and meridian." This was filed with the answer. (Record, p. 8.)

On the trial, a verdict was rendered against Tupper and Lanfesty, and judgment was entered on the verdict January 4th, 1883, as follows:

"This cause came on regularly for trial on the fourth day of January, 1883, being a day in the November, 1882, term, * * * and the jury having subsequently rendered the following verdict, we, the jury, find in favor of the plaintiff against the defendants, John O. Tupper and Adolphus Lenfesty, and that said defendants were each severally in the wrongful possession of the lands respectively described in their several answers, and no others, and that the value of the rents and profits of the lands so held and possessed by defendant Tupper is one hundred dollars, of the land so held and possessed by defendant Lenfesty one hundred dollars, and that the value of each one of said tracts of 160 acres is three thousand dollars, and of the two of them six thousand dollars," and the court having ordered that judgment be entered herein in accordance with said verdict:

Now, therefore, by virtue of the law and by reason of the premises, it is considered by the court that Tully R. Wise, plaintiff, do have and receive of and from John O. Tupper, one of said defendants, the possession of the northeast quarter of section twenty-one, township three north, range eight east, Mount Diablo base and meridian, containing 160 acres of land and situate in the county of San Joaquin, State of California, and the sum of one hundred dollars, rents and and profits; from Adolphus Lenfesty, another of said defendants, the possession of the southeast quarter of section twenty-one, township three north, range eight east, Mount Diablo base and meridian, situate in San Joaquin county, State of California, and the sum of one hundred dollars rents and profits.

And it is further considered by the court that said plaintiff recover from said defendants, John O. Tupper and Adolphus Lenfesty, his costs in this behalf expended, taxed at forty-nine $\frac{80}{100}$ dollars.

Judgment entered January 4th, 1883. (Rec., 9, 10.)

(There was a verdict and judgment entered January 16, 1883, against said Bucher and Baker. (Rec., 11, 12.) These parties have not sued out the writ of error.)

On the 11th January, 1883, there was filed a stipulation signed by Tully R. Wise, as follows:

It is hereby stipulated that the subject-matter in dispute in said action, as against defendants, John O. Tupper and Adolphus Lenfesty, and as answered for by them, exceeds in value the sum of five thousand one hundred (5,100) dollars, exclusive of costs.

Dated this 13th day of October, 1882.

TULLY R. WISE,
Attorney for Plaintiff.

Endorsed: Filed January 11th, 1883. L. S. B. Sawyer, clerk, (Rec., 12–13.)

Argument.

It is respectfully submitted that the stipulation filed on the 11th January, 1883, *after* the rendition of the judgment against the plaintiffs in error, can have no effect to change or modify the facts found by the jury and *the judgment of the court thereon*, or to confer on this court jurisdiction of the appeal. It must, consistently with the verdict and judgment, be regarded as relating to the aggregate value of lands in possession of the two defendants, and not to the separate interest of each. The record shows that Tupper and Lenfesty claimed the right of possession to separate tracts of 160 acres each and disclaimed all right to any other lands, and that the interest of each in the judgment rendered against them severally was the value of one quarter section, with the rents and profits added; and in the instructions to the jury the court stated that each defendant "should pay the rents and profits arising from his particular piece of land." (Rec., p. 20.)

It is well settled by the decisions of this court that the separate interests of the parties appealing cannot be united

to make up the amount necessary to give jurisdiction to this court.

See—

Adams *vs.* Crittenden, 106 U. S., p. 576.
Ex parte B. & O. R. R. Co., 106 U. S., p. 5.
Russell *vs.* Stansell, 105 U. S., p. 303.
Paving Co. *vs.* Mulford, 100 U. S., 147.

II.

The Motion to Affirm.

Should the court be of the opinion that it has jurisdiction, then we respectfully submit that the motion to affirm should be granted.

On the trial of the cause in the court below the plaintiffs in error excepted to the instructions of the court to the jury, that a United States patent conveys the legal title and cannot be impeached by a defendant in ejectment by the introduction of evidence tending to show the title was still in the United States.

The plaintiffs in the court below derived title from a patent issued by the President of the United States, April 9, 1870, (Rec., 13, 14,) in which it is recited that the said patent is issued "pursuant to the said acts of Congress" therein recited, (p. 14.) The court, having admitted the patent and the other conveyances in evidence, transmitting the title to the defendants in error, and having rejected the evidence offered by the plaintiffs in error to show a right derived by them from settlement made in March, 1877, upon the lands as public lands of the United States—charged the jury as follows, (Record, p. 20:)

"Gentlemen: There is really but one issue of fact upon which there is any conflict in the testimony in this case, and that is the value of the rents and profits of these pieces of land. The plaintiffs have put in evidence the patent of the United States, and claim title through that patent to themselves; that shows the legal title in them; whether they

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"Gentlemen: There is really but one issue of fact upon which there is any conflict in the testimony in this case, and that is the value of the rents and profits of these pieces of land. The plaintiffs have put in evidence the patent of the United States, and claim title through that patent to themselves; that shows the legal title in them; whether they

have got it rightfully or not, is not open for consideration in this case. If they have got it wrongfully, the remedy is elsewhere. There was a grant made to the Western Pacific Railroad Company of certain lands. There were certain officers appointed to ascertain whether these lands were in the grant or not. They have passed on that question and issued the patent. Their action is conclusive so far as this case is concerned. The legal title is, whether rightfully or wrongfully, in the plaintiffs in this case. There was a larger amount sued for than the evidence shows that plaintiffs have title to. Each of these four defendants now under consideration denies possession of the whole land, and sets up that he is in possession of 160 acres only, describing it. The evidence tends to establish that fact. The only question for you to determine is—because the other is a question of law decided by the court upon the title being shown—what amount the plaintiffs shall recover. As the defendants have defended separately, there should not be a joint judgment for all the rents and profits. Each should pay the rents and profits arising from his particular piece of land."

This charge is sustained by numerous decisions of the United States Supreme Court.

In Steel *vs.* Smelting Co. (106 U. S. at p. 450) this Court, speaking through Mr. Justice Field, said:

"We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of differents acts of Congress are fully complied with."

The Court reviews several of its decisions, showing that a party asserting an equity against a patent must first get rid of the patent by direct proceedings for its annulment or limitation; that even where false and perjured testimony may have been used to secure a patent, the validity of the

patent *cannot be assailed collaterally* any more than a judgment of a court of justice can be. (Ib., 453.)

The court quotes approvingly the language of Justice Miller, used in French *vs.* Fyan, 93 U. S., 169, "that the action of the Land Office in issuing a patent for any of the public land subject to sale by pre-emption or otherwise is conclusive of the legal title," &c.

In the elaborate decision of this court, in the United States *vs.* Schurz, 102 U. S., Rep., 378, the court said also, "that the patent of the United States, when fully completed in pursuance of the decisions of the Land Deparment, *carried* with it the title of the United States to the land," * * * and if the patent "has been issued without authority of law or by mistake of facts or by fraud of the grantee, the United States, by a bill in chancery, can have a decree annulling the patent.

See also—

Smelting Co. *vs.* Kemp, 104 U. S., p. 636, and
Moore *vs.* Robbins, 96 U. S., 530.

There is no allegation of fraud in the record of the case at bar, and the only averment of the illegality of said patent is as follows:

"That the pretended patent under which alone plaintiffs claim title and right to the possession of the land described in the complaint was issued by the officers of the United States Land Department without authority of law, and under a mistake of law, and the same is now and has always been null and void," (Rec., 7.)

It is not pretended that the land did not come within the jurisdiction of the land officers, nor that it was not a part of the Government domain; for the record shows that the plaintiffs in error claim the right to the possession of the respective tracts as pre-emption settlers, (Rec., 5–6.)

We respectfully submit that the writ of error should be dismissed, or the judgment below affirmed.

As also showing that this writ has been sued out for delay, we respectfully refer to the case in 8 Sawyer's reports, p. 81, of the United States *vs.* The Central Pacific Railroad Company, wherein the circuit court decided that the identical patent of April 9th, 1870, found in this record, is the basis of a good title to the lands therein mentioned, which lie in township No. 3 N., of range No. 8 east; and that said township was never within the "Moquelamos claim," and never reserved from grant.

The records of this court do not show that the Government has taken an appeal, or sued out a writ of error in that case. That decision was filed April, 1881, and the ejectment case of Bailey and Carpenter *vs.* Lynch and others was instituted in March, 1882.

HENRY BEARD,
CHAS. H. ARMES,
Att'ys for Deft's in Error.